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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1019

ALMA M. GREEN and HARRY GREEN,
Petitioners,

vs.

OSGOOD-LEWIS-PERKINS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR RESPONDENT IN OPPOSITION

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B.

JURISDICTIONAL QUESTIONS

Petitioners attempt to establish jurisdiction for a Writ of Certiorari by asserting that certain questions involving Federal Statutes were presented to and erroneously decided by the trial court and The Supreme Court of Nebraska.

However, Petitioners have departed so far from the form and requirements prescribed by *Rule 23, Revised Rules of The Supreme Court,* in failing to state concisely the manner in which Petitioners contend that the lower courts have been presented with a Federal Question, or when or how either court decided said question, that Respondent is unable to make a concise reply.

Rule 23, Revised Rules of the Supreme Court.

> "4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

In *Southern Power Co.* v. *North Carolina Public Service Co. et al.,* 263 U.S. 508, 44 S. Ct. 164 [1924], the Court *held:*

> "A petition to the United States Supreme Court for a Writ of Certiorari should make a clear, definite and complete disclosure concerning the controversy, since it is impossible for the Court critically to examine the record before ruling on the application, and it must rely largely on preliminary papers."

From a review of Petitioners' Brief as a whole, it would appear the Petitioners' contention is that the trial court

and The Supreme Court of Nebraska *by inference* necessarily considered and decided the Case upon the interpretation of various sections of Title 43 and Title 28, U.S.C.A.

Petitioners, however, fail to set forth in their Petition when or in what manner these questions were first raised in the trial court, or in the "Assignments of Error" to the Appellate Court, or the way in which said court passed upon any of same.

In *Southwestern Bell Telephone Co.* v. *State of Oklahoma et al.*, 303 U.S. 206, 58 S. Ct. 528 [1938], in ¶[3], the Court *held:*

> [3] "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

It is submitted that only one of the Federal Questions, which Petitioners now assert, to wit: §772 of Title 43, U.S.C.A., further discussed on page 5, was ever raised other than in their present Petition, and that was in their "Brief in Support of Motion for Rehearing and for Stay of Issuance of Mandate for Purpose of Prosecuting Proceedings to United States Supreme Court on Petition for Writ of Certiorari". (Appendix, page A4.) The complete "Brief" has been certified to the Court, as a part of the record, by Petitioners.

C.

There were no Federal Statutes, Treaties or Regulations cited or presented to the trial court, or considered by The Supreme Court of Nebraska.

If certiorari were granted, the only question which this Court would consider on the merits, under its rules. would be the question of ownership of Nebraska real estate as between Petitioners and Respondent, all of whom are residents of the State of Kansas.

E.

STATEMENT OF THE CASE BEFORE THIS COURT

Petitioners now seek to have the decision of The District Court of Richardson County, Nebraska, and the affirming opinion of The Supreme Court of Nebraska. determining the ownership of real estate, admittedly located in Richardson County, Nebraska, reviewed by this Court on the basic grounds that the lower courts did not properly apportion the accretion land in question.

F.

ARGUMENT IN OPPOSITION TO JURISDICTION FOR WRIT OF CERTIORARI

I

"The Amended Answer and Cross-Petition" filed by Petitioners in the District Court of Richardson County, Nebraska, failed to disclose to the trial court any Federal Questions. No reference was made to any of the Federal Statutes which Petitioners now assert were erroneously considered by the lower courts. (Tr. pp. 7-13.)

Petitioners fail to set forth in their "Petition for Writ of Certiorari" where in the trial of the case any federal constitutional provisions, treaties, statutes, ordinances or regulations were presented to, or considered by, the lower courts.

Petitioners in their "Brief on Appeal to The Supreme Court of Nebraska" did not include in their "ASSIGNMENTS OF ERROR RELIED UPON FOR REVERSAL", any federal constitutional provisions or statutes, or make claim that the trial court considered or applied such erroneously or otherwise. (Appendix, page A1.) The complete "Brief" has been certified to the Court, as a part of the record, by Petitioners.

Under the Rules of The Supreme Court of Nebraska, the court, in the consideration of the cause, will not consider any error not assigned or argued. *Revised Rules of The Supreme Court of The State of Nebraska, 8a2.(3).* (Appendix, page A1.)

> "Supreme Court on Appeal has no duty to search to ascertain if there is error in record, and every reasonable presumption will be indulged in favor of correctness of any ruling of the trial court, and any ruling alleged to be erroneous must be specifically pointed out to be reviewed." *Wieck* v. *Blessin,* 165 Neb. 282, 85 N.W. 2d 628 [1957].

One of the Federal Statutes which Petitioners now attempt to pose as a basis for a Writ of Certiorari *was first mentioned or cited* to The Supreme Court of Nebraska *after it had rendered its decision* for Respondent on June 11, 1965.

This one, §772 of Title 43, U.S.C.A., was first cited to the lower court in Petitioners' "Brief in Support of Motion for a Rehearing and for Stay of Issuance of Mandate for Purpose of Prosecuting Proceedings to United States Supreme Court on Petition for Writ of Certiorari" before The Supreme Court of Nebraska, filed August 12, 1965. (*Excerpt* appearing in Appendix, page A4.)

Petitioners claim "erroneous" *interpretation by inference*—and specify nothing.

§913 of Title 43, and the sections of Title 28 U.S.C.A., upon which Petitioners now rely, were *never cited to, or raised in,* said appellate court *by any means whatsoever.*

> "This Court is a Court of Review, and it will not consider questions not raised or disclosed by the record brought to it for review which were not considered by the Courts below." *Edward Hines Yellow Pine Trustees* v. *Martin et al.,* 268 U.S. 458, 45 S. Ct. 543 [1925].

II

Even though no Federal Questions were presented to the lower courts, had the claimed issues been properly raised and preserved they would in no way have altered or affected the substantive decisions of said courts.

1. Title 43 of the United States Code deals exclusively with "Public Lands", and by the title's own definition (43 U.S.C.A. §1361), does not pertain to this land, nor to any land which is not Federal land that is under The Bureau of Land Management. (Appendix, page A4.)

2. Petitioners rely upon Title 28 U.S.C.A. §1738, arguing that The Supreme Court of Nebraska did not give "full faith and credit" to the decision of the District Court of Doniphan County, Kansas, and The Supreme Court of Kansas, in the case of *Green* v. *Ector et al.,* 187 Kan. 240, 356 P.2d 664 [1960].

Petitioners did not present the question of full faith and credit to The Supreme Court of Nebraska, but insisted that the Kansas decision was *"res judicata* and *stare decisis"* to the rights of the parties.

The Kansas Court did not attempt to resolve the title to any Nebraska land, and the Nebraska Court did not attempt to determine the title to any Kansas land.

The question of the proper method of apportionment of accretion land was not considered by the Kansas court, and The Supreme Court of Nebraska, partly for that reason, held that the Kansas decision was not controlling.

The Kansas Court *quieted title to certain lands in Kansas* in Plaintiff Green, now one of the Petitioners in this Court, *and nothing more.*

The Supreme Court of Nebraska held in this regard, in *Osgood-Lewis-Perkins, Inc.* v. *Green et al.*, 178 Neb. 807, 135 N.W. 2d 718 [the case which is the subject of Petitioners' Petition]:

> "Defendants also rely upon principles of res judicata. *Green* v. *Ector,* 187 Kan. 240, 356 P. 2d 664, is said to be decisive of Alma's right to accretion.
>
> In the pleadings, the findings of fact, the conclusions of law, and the judgment we discover no suggestion that title to accretion in Kansas was quieted in Alma on the basis of accretion in Nebraska. The contestants were Alma and the State of Kansas. By stipulation Alma was to prevail unless the land was an island.
>
> Nothing in that case affects any right in this case. If a question of fact was neither directly nor indirectly in issue in a former action, a judgment in the former action clearly is not conclusive of the question in a subsequent suit on a different cause of action. See *Boomer* v. *Olsen,* 143 Neb. 570, 10 N.W. 2d 507."

The trial court and The Supreme Court of Nebraska both found from the evidence presented, that title to the Nebraska real estate was in Respondent.

III

The substantive question decided was simply a question of the ownership of Nebraska real estate, which, in the absence of diversity, is a question over which the courts of the State of Nebraska have exclusive jurisdiction.

Furthermore, in the absence of a violation of a person's constitutional rights, federal courts lack the authority and power to review such State Court decisions determining title to non-public lands located in the several states.

CONCLUSION

Petitioners have failed to establish in their Petition for a Writ of Certiorari that any Federal Question was ever presented to the trial court, or timely presented to and ruled upon by The Supreme Court of Nebraska, or that a Federal Question of substance was decided in a manner that was probably not in accord with the decisions of this Court; and accordingly a Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, James R. Hoover, the attorney of record for Osgood-Lewis-Perkins, Inc., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1966, I served three copies of the foregoing "Brief for Respondent in Opposition", on Petitioners, by depositing the same in the United States Postoffice in Prairie Village, Kansas, duly addressed to William L. Walker, 636 Stuart Building, Lincoln, Nebraska, one of the attorneys of record for the Petitioners, with first class mail postage paid.

.....

JAMES R. HOOVER
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APPENDIX

REVISED RULES OF THE SUPREME COURT OF NEBRASKA 1963

* * *

8. Briefs, Preparation.

a. 2

* * *

(3) ASSIGNMENTS OF ERROR. Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned.

ASSIGNMENT OF ERRORS APPEARING IN PETITIONERS' APPEAL BRIEF IN THE SUPREME COURT OF NEBRASKA, appearing on page 10 thereof:

ASSIGNMENTS OF ERROR RELIED UPON FOR REVERSAL

The court erred in finding and ordering as follows:

1. That appellants failed to establish by evidence that it would be equitable to allocate the accretion lands by the proportionate method to appellant Alma M. Green.

2. That the evidence showed that doing equity required that all accretion land in question must be allocated by extending the Kansas-Nebraska state line and existing sectional lines eastward to the Missouri River and attaching the accretion land as now formed to the Nebraska riparian owner as determined by extended lines to appellee in fee simple.

3. In quieting title to said accretion land described in (E51:40, 601) and (E52:40, 628) by metes and bounds containing about 212.5 acres in fee simple in appellee.

4. That C. B. & Q. RR. Co. was not a riparian owner and the accretion thereto was not riparian, but such accretion was riparian to land of appellee and its predecessors in title and conveyance of the right of way of C.B.&Q. RR. Co. did not convey riparian rights to Richardson County, Nebraska.

5. That appellant Alma M. Green did not establish title to her Kansas accretion land by judgment and decree in the case in the District Court of Doniphan County, Kansas entitled *Alma M. Green* v. *John T. Ector et al.*, Case No. 8968, by using the proportionate method of allocating accretion land.

6. That said judgment and decree in said Kansas case entered in favor of appellant Alma M. Green against the State of Kansas and William F. Perkins and Catherine O. Perkins was neither res judicata nor stare decisis against appellee.

7. That appellants Green failed by a preponderance of evidence to establish title by adverse possession to any part of the Nebraska accretion land.

8. That said judgment and decree entered by the court was against the weight of the evidence, and a preponderance of the evidence does not support such judgment and decree and some are contrary to the evidence; but preponderates in favor of a judgment and decree for appellant in the granting of appellants cross petition and in voiding judgment and entering judgment and decree for appellant.

9. That said judgment and decree entered by the court are contrary to the law and such judgment and decree for

appellant quieting her title in fee simple in said disputed land on her cross-petition would not have been contrary to law.

10. That the evidence does not support a judgment and decree in favor of appellee to any lands by extending the Kansas-Nebraska state line and existing sectional lines east to the thread of the Missouri River to any land described as N½ S½ of Section 31 and N½ S½ of Section 32, Township 1 North, Range 19 East of 6th P. M., Richardson County, Nebraska; because appellee actually disclaimed any interest in said above described land.

11. The land of appellee described as Lot 1, Section 31-1-19, was not riparian and could not have had attached to it accretion land as contended by appellee and found and ordered by the court.

12. The court erred in admitting into evidence over objection of appellants the following exhibits: (E3:13, 1395), (E5:13, 1395), (E26:16, 31), (E28:16, 1398), (E30:16, 1399) and (E31:16, 1400).

13. The court erred in sustaining objections to (E59: 508, 1405) and excluding same from evidence.

14. The court did not abuse its discretion and err in excluding the offered amendments of appellee to its amended petition to allege damages prior to institution of this action which was not requested until all evidence had been admitted and all parties rested and the court had stated he was ready to announce the decision in the action.

15. The court erred in granting a temporary restraining order and temporary injunction during pendency of the action wherein possession of the disputed land was given to appellee and a permanent injunction against appellants excluding them from the land in dispute.

16. The court erred in taxing the costs in the action to appellants.

17. The court erred in entering a judgment for $27.00 as damages for wheat crop raised by appellants on disputed land in 1963.

EXCERPT FROM PETITIONERS' ARGUMENT IN THEIR **"BRIEF IN SUPPORT OF MOTION FOR A REHEARING AND FOR STAY OF ISSUANCE OF MANDATE FOR PURPOSE OF PROSECUTING PROCEEDINGS TO UNITED STATES SUPREME COURT ON PETITION FOR WRIT OF CERTIORARI" on page 31 thereof, filed August 12, 1965.**

* * *

E. THE COURT ERRED IN ITS DECISION ON FEDERAL QUESTIONS INVOLVED.

(1) The court erred in its *interpretation by inference* [italics supplied] of Sections [sic] 43 U.S.C.A., Sections 751, 752, 770, 772, and 773, providing for surveys by General Land Office as to whether original survey or resurvey shall control the established meander line from which a surveyor must start his survey for purpose of apportioning accretion land among riparian owners.

TITLE 43, U.S.C.A., §1361

§1361. DEFINITION OF "PUBLIC LANDS"

For the purposes of this chapter the term "public lands" means all Federal lands administered by the Bureau of Land Management. Pub. L. 86-649, § 2, July 14, 1960, 74 Stat. 506. [Italics Supplied.]